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No. 89-1875

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

CITY OF SANTA ANA,
Petitioners,
vs.
DALE CONNER AND LINDA CONNER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM A. SNYDER
27001 La Paz Road
Suite 300
Mission Viejo, California 92691
(714) 837-3613
Attorney for Respondents.

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
LISTING OF PARTIES	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
The Uncontroverted Facts	4
The Claims of Respondents	7
The Rulings Below	7
SUMMARY OF THE ARGUMENT	8
REASONS FOR DENYING THE PETITION	9
1. The Character of the Reasons for Certiorari Set Forth in Rule 10 Are Not Present Here	9
2. The Ninth Circuit's Decision Was Consistent With Prior Decisions of This Court	9
3. The Ninth Circuit Was Correct in Ruling That Clearly Established Constitutional Law Was Violated	11
4. Requiring Municipal Officials to Comply With the Warrant Requirement in The Context of Non-Exigent Nuisance Abatement Searches and Seizures Does Not Unduly Burden Local Government	14
CONCLUSION	16
APPENDICES	
A. Cal. C. Civ. Pro., section 1822.50, et. seq.	
B. Cal. Civ. Code, section 3479 et seq.	

TABLE OF AUTHORITIES

Cases

	Page
Anderson v. Creighton, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987)	9, 11
Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973)	10
Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)	8, 12
Capeoman v. Reed, 754 F.2d 1512 (9th Cir. 1985)	12
Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970)	13
G.M. Leasing Corp. v. United States, 429 U.S. 338, 50 L.Ed.2d 530, 97 S.Ct. 619 (1977)	10
Gleaves v. Waters, 175 Cal. App. 3d 413, 220 Cal.Rptr. 621 (1985)	8, 14
Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967)	10
Michigan v. Tyler, 436 U.S. 499, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1978)	8, 12
Ward v. County of San Diego, 791 F.2d 1329 (9th Cir. 1986)	12
Welsh v. Wisconsin, 466 U.S. 740, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984)	14
Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)	11

United States Constitution

Fourth Amendment	7, 8, 9, 10, 12, 13, 15
Fifth Amendment	7
Fourteenth Amendment	7

Table of Authorities

Statutes

	Page
Civil Rights Act of 1965	
42 U.S.C. Section 1983	7
Cal C. Civ. Pro.	
Section 1822.50 et seq.	14
Section 1822.50	3
Section 1822.51	3
Section 1822.52	3
Section 1822.53	3
Section 1822.54	3
Section 1822.55	3
Section 1822.56	3
Section 1822.57	3
Cal. Civ. C.	
Section 3479, et seq.	5
Cal. Veh. C.	
Section 5050	5
Section 5051	5
Section 5052	5, 15
Santa Ana Municipal Code	
Section 16-110	2
Section 16-112	5
Section 16-113	2
Section 16-114	3
Section 16-121	3
Section 41-80	3
Rule 10, Supreme Court Rules	9

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LISTING OF THE PARTIES

Dale Conner and Linda Conner; Respondents herein, appeared before the United States Court of Appeals for the Ninth Circuit as appellants in docket number 87-6683 and as cross-appellees in docket numbers 88-5510, 88-5512 and 88-5536. All appeals were consolidated before the United States Court of Appeals for the Ninth Circuit.

City of Santa Ana; Petitioner herein, appeared before the United States Court of Appeals for the Ninth Circuit as appellees in docket number 87-6683 and as cross-appellants in docket numbers 88-5510, 88-5512 and 88-5536.

Yancy's Auto Body, Inc., dba California Towing; Appeared before the United States Court of Appeals for the Ninth Circuit as appellees in docket number 87-6683.

Robert Bobb, Edward J. Cooper, Raymond C. Davis, Capt. C. R. Miller, Lt. Greg Cooper, Lt. Ken Hall, Sgt. Richard Bower, Sgt. Dan Felix, Abatement Officer Louis Garcia, Officer Michael Cabrerra, Officer Eric Vedborg, Officer John Taylor, Officer Marco Zavala, Officer Steve Despenas; Appeared before the United States Court of Appeals for the Ninth Circuit as appellees in docket number 87-6683.

STATUTES INVOLVED

Santa Ana Municipal Code;

> "the presence of an abandoned, wrecked, or dismantled or inoperative vehicle, or part thereof, on private . . . property . . . is hereby declared to constitute a public nuisance."

S.A.M.C., section 16-110.

Administration and Enforcement

> . . . In the enforcement of this article, such officer and his deputies may enter upon private or public property to examine a vehicle or parts thereof, or obtain information as to the identity of a vehicle and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this acticle.

S.A.M.C., section 16-113.

Authority to Remove

> When the Chief of Police has arranged with any person or persons, to accomplish the removal of a

vehicle or parts pursuant to this article, such person or persons shall be authorized to enter upon private property or public property for such purpose.

S.A.M.C., section 16-114.

Disposition of Vehicle After Order of Appeal

Five (5) days after adoption of the order declaring the vehicle or parts thereof to be a public nuisance, five (5) days from the date of mailing of notice of decision if such notice is required by this article, or fifteen (15) days after such action of the City Council authorizing removal following appeal, the vehicle or parts thereof may be disposed of by removal to a scrap yard or automobile dismantlers' yard. . . .

S.A.M.C., section 16-121.

Inoperative vehicle

Any vehicle, either mechanically or legally incapable of being driven on a public street or highway.

S.A.M.C., section 41-80.

California Code of Civil Procedure

Title 13 Inspection Warrants [Appendix A]

Section 1822.50 — Definition.

Section 1822.51 — Affidavit for issuance of warrant.

Section 1822.52 — Grounds for issuance.

Section 1822.53 — Examination of witnesses.

Section 1822.54 — Issuance and contents of warrant.

Section 1822.55 — Duration of warrant; Extension or renewal; Execution: Return.

Section 1855.56 — Manner of inspection; Notice.

Section 1855.57 — Refusal to permit inspection.

STATEMENT OF THE CASE

The Uncontroverted Facts

In March, 1983, the City of Santa Ana, by Police Lt. Cooper, assigned Abatement Officer Garcia to investigate complaints of inoperative vehicles on respondents' property. Under the terms of the Santa Ana Municipal Code, the Abatement Officer was concerned only with whether the motor vehicles were legally and mechanically operable. The Vehicle Abatement Manual of the Santa Ana Police Department further defined "inoperable" vehicles as including those with flat tires, dead batteries or unregistered with the Department of Motor Vehicles.

On July 1, 1983, after visiting respondents' home the prior day, Abatement Officer Garcia arrived at respondents' home with at least five other officers [appellees before the Ninth Circuit]. At the direction of Sgt. Bower, Abatement Officer Garcia entered the enclosed backyard of respondents without a warrant, and over the express objection of Mrs. Linda Conner, accompanied by officer Michael Cabrerra, while the other officers [Eric Vedborg, John Taylor, Marco Zavala] stood by to assist. Sgt. Bower had ordered the search to determine if any of vehicles were possible public nuisances under the Santa Ana Municipal Code.

Officers Garcia and Cabrerra proceeded to walk on the tops, hoods, and trunks of several cars stored in the backyard, and thereafter searched the vehicles and obtained vehicle identification numbers [V.I.N.s] of five vehicles discovered in the backyard. Abatement Officer Garcia used the V.I.N.s secured during the search of the cars to run a stolen vehicle check and to process abatement citations on the five vehicles that same day. The

Conners asked for and received a hearing from the police department regarding the City's notice.

Lt. Cooper was appointed by the Police Chief to decide the question of whether the Conner's vehicles were "inoperable". Prior to the hearing, the Police Chief was advised by his traffic commander that "special interest vehicles, as defined in the California Vehicle Code, currently fall within the parameters of our abatement ordinance", but that "California Vehicle Code Section 5052 allows a collector to store one or more historic or special interest vehicles outdoors on private property."

The initial abatement hearing was conducted by Lt. Cooper who decided that the five vehicles were "inoperable", but did not consider whether they were classic and/or special interest vehicles or whether they were a "public nuisance" as defined by the California Civil Code. *See* Appendix B. On August 23, 1983, the Police Chief issued a decision finding the vehicles "abatable".

The Conners appealed to the Santa Ana City Council. The City Council appointed a Hearing Officer to conduct a hearing and file a written recommendation. After conducting the hearing, the Hearing Officer concluded that the Conners had presented unrebutted evidence that the vehicles in question were classics and/or special interest vehicles and therefore protected under the California Vehicle Code, sections 5050, 5051 and 5052 thereof. The Hearing Officer decided however, that the Vehicle Code defers to local ordinances and that the S.A.M.C. specifically required the vehicles be enclosed in a building [S.A.M.C., section 16-112].

The Hearing Officer recommended that Mr. Conner be given one 30 day extension within which to prove that the vehicles in question were operable or to obtain a building

permit. The Hearing Officer concluded that it appeared that "the actions of the SAPD were within the provisions of the Santa Ana Municipal Code". On February 19, 1985, the City Council adopted the Hearing Officer's recommendation, but denied the thirty day extension.

On June 7, 1985, [108 days after the City Council's adoption of the recommendation], city officials removed a portion of the fence enclosing the Conner's backyard while the Conners were not at home, and without a warrant, entered the backyard to remove two vehicles which had remained in the yard after the Conners had removed three of the others. The two vehicles were seized by the officials and towed away by tow trucks called to assist and thereafter summarily destroyed pursuant to municipal policy. Officers Felix, Garcia and Despenas were municipal officials involved in this second warrantless search and seizure.

Lt. Ken Hall was the traffic commander of the Traffic Section for the Santa Ana Police Department from November, 1982, through at least May 21, 1986. As traffic commander, Lt. Hall was the supervisory official responsible for the abatement detail and was also the official who had been delegated the responsibility to train the Abatement Officer with regard to Abatement Procedures on behalf of the Santa Ana Police Department.

During the period that Lt. Hall was traffic commander in charge of the abatement detail, he did not author, assemble, compile or approve any documents, orders, training bulletins or memordanda concerning the duties and responsibilities of Abatement Officers for the City of Santa Ana. During this period, the official policy of the City of Santa Ana was that its municipal code permitted warrantless searches of residential premises to permit

inspection for, and abatement of, inoperative motor vehicles.

Lt. Hall had also directed Abatement Officer Garcia to have the Conner vehicles towed away from their backyard sometime after February 19, 1985 [the date of the City Council's action adopting the recommendations of its Hearing Officer].

The Claims of Respondents

The Conners brought suit under 42 U.S.C. section 1983 contending, among other things, that the warrantless entries of July 1, 1983 and June 7, 1985, together with the warrantless seizure of the two vehicles on June 7, 1985, had violated their rights under the Fourth Amendment to the United States Constitution.

The Conners also contended that the use of illegally seized evidence in the context of the municipal hearing as a matter of municipal policy, had violated their rights to due process of law under the Fifth and Fourteenth Amendments, and that the summary destruction of their property without judicial authorization or intervention similarly violated their Fifth and Fourteenth Amendment rights to due process.

The Rulings Below

On August 12, 1987, the district court granted, in part, the Conners' motion for summary judgment, finding that the warrantless, non-exigent search of July 1, 1983, violated the Fourth Amendment rights of the Conners. The district court granted petitioner's motion for summary judgment on the Conners' claim that the search and seizure of June 7, 1985, violated their Fourth Amendment rights and upon all other claims.

The district court also held that the officers who had conducted the searches, those who had assisted, as well as their supervisors and training officers, were immune from liability based upon qualified immunity, finding that the law governing nuisance abatement searches was not sufficiently established to impose individual liability.

On March 1, 1990, the Ninth Circuit Court of Appeals reversed, in part, the previous judgment of the district court. The Court of Appeals held that the Fourth Amendment's warrant protection applied not only to the initial, non-exigent search of July 1, 1983, but to the second non-exigent search and seizure of June 7, 1985, as well. The Court of Appeals held that in light of *Michigan v. Tyler,* 436 U.S. 499, 504-07, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1978), the law requiring a warrant to search for and abate a known public nuisance was clearly established as of July 1, 1983 and June 7, 1985. The Court of Appeals reversed the district court's grant of summary judgment to the individual defendants.

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit was consistent with the prior decisions of this Court in *Michigan v. Tyler, supra,* and *Camara v. Municipal Court,* 387 U.S. 523, and not in conflict with a decision of any United States Court of Appeals on the matter; the decision was consistent with the decision of a California Court of Appeals on a closely analogous, if not identical, question of federal law, *Gleaves v. Waters,* 175 Cal. App. 3d 413, 220 Cal.Rptr. 621 (1985); the decision refusing to grant qualified immunity as a matter of law, where the municipal actors violate clearly established law, was well within the accepted and usual course of judicial proceed-

ings, e.g., *Anderson v. Creighton,* 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987).

REASONS FOR DENYING THE PETITION

1. The Character of the Reasons for Certiorari Set Forth in Rule 10 Are Not Present Here.

Rule 10 of the Rules of the Supreme Court indicates the character of reasons that will be considered by the Court in exercising its discretion to grant a petition for writ of certiorari. Rule 10 (1) expessly notes that a petition for writ of certiorari will be granted only when there are special and important reasons therefor.

The decision of the Court of Appeals for the Ninth Circuit was not in conflict with any decision of another United States Court of Appeals on the same matter; did not decide a federal question in a way which was in conflict with a state court of last resort; and was not a far departure from the accepted and usual course of judicial proceedings. In fact, the decision of the Court of Appeals for the Ninth Circuit was in accordance with previous decisions of this Court; decided a federal question consistent with a state court of appeals; and was clearly within the accepted and usual course of judicial proceedings.

2. The Ninth Circuit's Decision Was Consistent With Prior Decisions of This Court.

In holding the entry and seizure of June 7, 1985, to be governed by the fourth amendment's warrant requirement, the Court of Appeals noted that the Supreme Court has instructed that;

> "In construing this command]of reasonableness], there has been general agreement that "except in

> certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

Opinion at 9a, citing, *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *Katz v. United States*, 389 U.S. 347, 356-57 (1967).

The Court of Appeals correctly noted that the petitioner had never made any contention that the June 7, 1985 action fell within any of the " 'carefully defined classes of cases' which permit warrantless searches or seizures." Rather, the City of Santa Ana, without benefit of any authority whatsoever, urged a new "adequate alternative process" exception to the warrant requirement. The Court of Appeals noted that *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 341, 342 n. 5 (1977), the taxpayer had numerous procedural opportunities prior to assessment, but such process played no role in the Court's application of the fourth amendment to the warrantless seizure there at issue.

Contrary to the contentions of the petitioner, the "extensive Pre-abatement Procedures" were not an adequate substitute for the participation of a neutral and detached magistrate. Neither the Hearing Officer nor the City Council ever issued a formal "abatement order" authorizing the removal of the vehicles after appeal.

Moreover, during the 108 days between the City Council's adoption of the Hearing Officer's recommendations and the time of the June 7, 1985 seizure, the respondents voluntarily took action to "abate" the "declared nuisance" by removing the majority of the offending vehicles from the premises. This fact is gleaned merely from

noting that five cars were cited on July 1, 1983, yet only two were present when seized on June 7, 1985.

3. The Ninth Circuit Was Correct in Ruling That Clearly Established Constitutional Law Was Violated.

Petitioners argue that they should be entitled to qualified immunity as a matter of law, arguing that their failure to be cognizant of the clearly established law was due to the absence of specific case law. This Court has previously held that it is *not* the case that an official action is protected by qualified immunity unless the very action in question has previously been held unconstitutional. *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 531, 107 S.Ct. 3034 (1987).

In *Anderson, supra*, this Court held that in order to hold a municipal official individually liable, the right the official is alleged to have violated must be "clearly established" in the sense that;

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [that] is to say that in the light of preexisting law the unlawfulness must be apparent."

Id, 97 L.Ed.2d at 531.

This Court has previously held that government officials must be held to a standard of conduct based on knowledge of basic, unquestioned constitutional rights. *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000-1001, 43 L.Ed.2d 214 (1975). In determining whether the law was "clearly established" the Court of Appeals for the Ninth Circuit holds that the reviewing court must look at: (a) binding precedent; or, in the absence thereof, (b) all

available decisional law including decisions of state courts, other circuits, and district court to determine whether the right was clearly established. *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986); *Capeoman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985).

The Court of Appeals for the Ninth Circuit did not err when it held that the law requiring a search warrant to abate a known public nuisance in a non-exigent context, was "clearly established" by the Supreme Court's decision in *Michigan v. Tyler, supra*, and *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). The language of this Court was precise;

> "The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. . . . These deviations from the typical police search are thus clearly within the protections of the Fourth Amendment."

Michigan v. Tyler, supra, 436 U.S. at 504-505.

Even if one does not wish to consider *Tyler* and *Camara* as "binding precedent", these cases nevertheless serve to assist in establishing the contours of the fourth amendment warrant protections in the context of nuisance abatement searches.

Petitioners further contend that State and Local laws permitted their unconstitutional actions, again stating that the S.A.M.C. gave them authority to make warrantless searches and seizures of inoperable vehicles. This is simply not so. The Court of Appeals for the Ninth Circuit noted the existence of the state warrant procedures in denying petitioners' contention that state law permitted these warrantless abatement searches. *See* Opinion at p. 12a n.8 and Appendix A.

Moreover, the Court of Appeals correctly noted that "the municipal code does *not* state that warrants are not required." *See* Opinion at p. 12a. This Court has previously held that where a statutory scheme authorizes inspections, but makes no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77, 90 S.Ct. 774, 777, 25 L.Ed.2d 60 (1970).

Petitioners desperately argue that two federal judges concluded that petitioners did not violate respondents' constitutional rights and thus petitioners should not be held to answer for their actions. This argument ignores several relevant points: (1) the two federal judges referred to were the trial court judge, whose decision was overruled by the court of appeals, and the dissenting justice of the court of appeals for the ninth circuit; (2) each of these judges concluded that petitioners' actions of July 1, 1983, violated clearly established law and disagreed only with respect to the second warrantless and non-exigent search and seizure occurring on June 7, 1985; (3) each of these judges were advancing an unprecedented theory as an exception to the long held presumption that warrantless searches are unreasonable *per se*.

The Court of Appeals for the Ninth Circuit did not err in remanding for trial, the individual municipal defendants' claim that objective facts existed which led them to reasonably believe that the law permitted them to conduct warrantless non-exigent searches for inoperable vehicles deemed a public nuisance, even though such action was unconstitutional under clearly established law.

4. Requiring Municipal Officials to Comply With the Warrant Requirement in the Context of Non-Exigent Nuisance Abatement Searches and Seizures Does Not Unduly Burden Local Government.

Requiring a municipal official to obtain a warrant prior to seizing an inoperable vehicle located in an enclosed residential backyard is neither too burdensome nor against public policy. The warrant requirement is easily met, and as Justice Trott noted during oral argument, telephonic warrants have become a routine too, available where appropriate.

Moreover, the Court of Appeals correctly noted that the California legislature has provided a mechanism for obtaining a warrant to permit an inspection for nuisances. *See,* Cal. C. Civ. Pro. section 1822.50, et seq. at appendix A hereto. Satisfying the legislative requirements for such a warrant is made simple and routine.

The warrant limitation imposed by the California legislature is consistent with the principle expressed by this Court in *Welsh v. Wisconsin,* 466 U.S. 740, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984), where the Court observed that long-recognized principles prohibit warrantless searches of the home;

> "... application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed."

Id., 466 U.S. at 753.

At least one other appellate court has upheld a warrant requirement in the context of public nuisance abatement. *See,* e.g., *Gleaves v. Waters,* 175 Cal. App. 3d 413, 419, 220 Cal.Rptr. 621, (1985) (absent exigent circumstances, "of-

cials engaged in the abatement of a public nuisance" must have a warrant to enter an enclosed backyard).

In this instance, petitioners contend that the "offense" of maintaining an inoperable vehicle in one's enclosed residential backyard is of such severity as to justify the elimination of the fourth amendment's warrant protection and permit wholesale warrantless searches to facilitate the seizure of these vehicles, even in the absence of exigent circumstances.

Respondent's alleged "offense" was not so severe. The City's own Hearing Officer found unrebutted evidence that the vehicles were "classic and/or special interest vehicles" protected by California Vehicle Code, section 5052 [which permitted storage of such vehicles], but noted that Santa Ana's ordinance required that the cars be stored in a building. It was this fact alone that rendered the vehicles "abatable" under Santa Ana ordinance. No contention was ever made that the vehicles constituted a health hazard or were a threat to public safety. This is not the context within which to dispose of the warrant protections of the fourth amendment.[1]

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[1]State courts which have considered ordinances analogous to Santa Ana's have declared such *per se* definitions of nuisance unconstitutional and violative of due process. *See,* e.g., *Kadish v. Williamsport,* 19 Pa. Cmwlth. 643, 340 A.2d 617 (1970) (storage of autos may not be nuisance *per se,* but must be shown to be nuisance on basis of danger to public health and welfare); *Cf., Scottsbluff v. Winters Creek Coal Co.,* 155 Neb. 723, 53 N.W.2d 543 (1952). California courts have also recognized that a valid presumption must rely on a rational connection between the proven fact and ultimate fact. *In Re McGowen's Estate,* 35 Cal.App.3d 611, 111 Cal.Rptr. 39 (1973). The Court of Appeals for the Ninth Circuit rejected respondents due process challenge to the ordinance.

CONCLUSION

Based upon the foregoing, respondents respectfully urge this Court to deny the pending petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: August 16, 1990.

LAW OFFICE OF WILLIAM A. SNYDER

WILLIAM A. SNYDER

William A. Snyder
Attorney for Respondents
Dale Conner and Linda Conner

TITLE 13

Inspection Warrants

§ 1822.50. Definition.
§ 1822.51. Affidavit for issuance of warrant.
§ 1822.52. Grounds for issuance.
§ 1822.53. Examination of witnesses.
§ 1822.54. Issuance of contents of warrant.
§ 1822.55. Duration of warrant: Extension or renewal: Execution: Return.
§ 1822.56. Manner of inspection; Notice.
§ 1822.57. Refusal to permit inspection.
§ 1822.58. Inspections by personnel of Fish and Game Department.
§ 1822.59. Inspections for purpose of animal or plant pest or disease eradication.

Cal Jur 3d (Rev) Criminal Law §§ 2519, 2529, 2551.

§ 1822.50. [Definition.] An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning. [1968 ch 1097 § 1; 1980 ch 230 § 1.] *Cal Jur 3d Agriculture § 15, Process, Notices, and Subpoenas § 40, Witkin Summary (8th ed) p 1802.*

§ 1822.51. [Affidavit for issuance of warrant] An inspection shall be issued upon cause, unless some other provision of state or federal law makes another standard applicable. An inspection warrant shall be supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made. In addition, the affidavit shall contain either a statement that consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent. Amended Stats 1984 ch 476 § 2. *Cal Jur 3d (Rev) Criminal Law § 2523.*

§ 1822.52. [Grounds for issuance.] Cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area in-

spection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle. [1968 ch 1097 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2522.*

§ 1822.53. [Examination of witnesses.] Before issuing an inspection warrant, the judge may examine on oath the applicant and any other witness, and shall satisfy himself of the existence of grounds for granting such application. [1968 ch 1097 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2524.*

§ 1822.54. [Issuance and contents of warrant]. If the judge is satisfied that the proper standard for issuance of the warrant has been met, he or she shall issue the warrant particularly describing each place, dwelling, structure, premises, or vehicle to be inspected and designating on the warrant the purpose and limitations of the inspection, including the limitations required by this title. Amended Stats 1984 ch 476 § 3. *Cal Jur 3d (Rev) Criminal Law §§ 2528, 2529.*

§ 1822.55. [Duration of warrant: Extension or renewal: Execution: Return.] An inspection warrant shall be effective for the time specified therein, but not for a period of more than 14 days, unless extended or renewed by the judge who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such inspection warrant must be executed and returned to the judge by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed, is void. [1968 ch 1097 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2532.*

§ 1822.56. [Manner of inspection; Notice.] An inspection pursuant to this warrant may not be made between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, nor in the absence of an owner or occupant of the particular place, dwelling, structure, premises, or vehicle unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the regulation being enforced. An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning, which if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. Where prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary in the circumstances shown. [1968 ch 1097 § 1; 1980 ch 230 § 2.] *Cal Jur 3d (Rev) Criminal Law §§ 2530, 2533.*

§ 1822.57. [Refusal to permit inspection.] Any person who willfully refuses to permit an inspection lawfully authorized by warrant issued pursuant to this title is guilty of a misdemeanor. [1968 ch 1097 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2519.*

§ 1822.58. [Inspections by personnel of Fish and Game Department.] A warrant may be issued under the requirements of this title to authorize personnel of the Department of Fish and Game to conduct inspections of locations where fish, amphibia, or aquatic plants are held

or stored under Division 12 (commencing with Section 15000) of the Fish and Game Code. [1982 ch 1486 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2519.*

§ 1822.59. Inspections for purpose of animal or plant pest or disease eradication (a) Notwithstanding the provisions of Section 1822.54, for purposes of an animal or plant pest or disease eradication effort pursuant to Division 4 (commencing with Section 5001) or Division 5 (commencing with Section 9101) of the Food and Agricultural Code, the judge may issue a warrant under the requirements of this title describing a specified geographic area to be inspected by authorized personnel of the Department of Food and Agriculture.

(b) A warrant issued pursuant to this section may only authorize the inspection of the exterior of places, dwellings, structures, premises or vehicles, and only in areas urban in character. The warrant shall state the geographical area which it covers and the purpose of and limitations on the inspection.

(c) A warrant may be issued pursuant to this section whether or not the property owners in the area have refused to consent to the inspection. A peace officer may use reasonable force to enter a property to be inspected if so authorized by the warrant. Added Stats 1984 ch 476 § 4.

PART 3

Nuisance

TITLE

1. GENERAL PRINCIPLES. §§ 3479-3484.
2. PUBLIC NUISANCES. §§ 3490-3496.
3. PRIVATE NUISANCES. §§ 3501-3503.
4. MOTION PICTURES. §§ 3504-3508.2.

TITLE 1

General Principles

§ 3479. Nuisance, what.
§ 3480. Public nuisance.
§ 3481. Private nuisance.
§ 3482. What is not deemed a nuisance.
§ 3482.5. Commercial agricultural activities.
§ 3483. Successive owners.
§ 3484. Abatement does not preclude action.

Cal Jur 3d Nuisances §§ 1 et seq.; Cal Practice Ch 240 Model Action to Abate Nuisance and for Damages; Proceeding Under Red Light Abatement Law.

§ 3479. [Nuisance, what.] Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance. [1872; 1873-74 ch 612 § 284.] *Cal Jur 3d Alcoholic Beverages § 59, Health and Sanitation § 14, Highways and Streets § 74, Municipalities § 147, Nuisances §§ 5, 14-18; Cal Jur 3d (Rev) Criminal Law § 2056; Cal Practice §§ 240:1, 240:18; Witkin Crimes p 726; Witkin Procedure (3d) Actions § 174; Witkin Summary (8th ed) pp 2388, 2427, 2428, 5314, 5322, 5336.*

§ 3480. [Public nuisance.] A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. [1872; 1873-74 ch 612 § 285.] *Cal Jur 3d Alcoholic Beverages § 59, Municipalities § 147, Nuisances § 24; Cal Jur 3d (Rev) Criminal Law § 1697; Cal Practice § 240:1; Witkin Procedure (3d) Prov Rem § 275; Witkin Summary (8th ed). p 5316.*

§ 3481. Private nuisance. Every nuisance not included in the definition of the last section is private. [1872.] *Cal Jur 3d Nuisances § 24; Cal Practice § 240:1; Witkin Summary (8th ed) p. 5316.*

§ 3482. What is not deemed a nuisance. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. [1872.] *Cal Jur 3d Administrative Law § 96, Health and Sanitation § 14, Nuisances § 66; Witkin Summary (8th ed) p 5325.*

§ 3482.5. [Commercial agricultural activities] (a) No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changes condition in or about the locality, after the same has been in operation for more than three years if it was not a nuisance at the time it began.

(b) Subdivision (a) shall not apply, if the agricultural activity, operation, or facility, or appurtenances thereof obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin, or any public park, square, street, or highway.

(c) This section shall not invalidate any provision contained in the Health and Safety Code, Fish and Game Code, Food And Agricultural Code, or Division 7 (commencing with Secion 13000) of the Water Code, if the agricultural activity, operation, or facility, or appurtenances thereof, constitute a nuisance, public or private, as specifically defined or described in any such provision.

(d) This section shall prevail over any contrary provision of any ordinance or regulation of any political subdivision of the state.

(e) For purposes of this section, the term "agricultural activity, operation, or facility, or appurentances thereof" shall include, but not be limited to, the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural commodity including timber, viticulture, apiculture, or horticulture, the raising of livestock, fur bearing animals, fish, or poultry, and any practices performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market. [1981 ch 545 § 1.] Witkin Summary (8th ed) Equity § 105A.

§§ 3482.6, 3482.7. [Repealed, effective January 1, 1985, by their own terms.]

§ 3483. Successive owners. Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it. [1872.] *Cal Jur 3d Nuisances § 34.*

§ 3484. Abatement does not preclude action. The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. [1872.] *Cal Jur 3d Nuisances § 59; Cal Practice § 240:5.*

TITLE 2

Public Nuisances

§ 3490. Lapse of time does not legalize.
§ 3491. Remedies against public nuisance.
§ 3492. Remedy regulated, how.
§ 3493. Remedies for public nuisance.
§ 3494. Action.
§ 3495. How abated.
§ 3496. Award of costs and fees to prevailing party.

Cal Jur 3d Nuisances §§ 5 et seq.; Cal Practice Ch 240 Model Action to Abate Nuisance and for Damages; Proceeding Under Red Light Abatement Law.

§ 3490. Lapse of time does not legalize. No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. [1872.] *Cal Practice § 240:35; Witkin Procedure (3d) Actions § 348; Witkin Summary 8th ed) p 5316.*

§ 3491. [Remedies against public nuisance.] The remedies against a public nuisance are:

1. Indictment or information;

2. A civil action; or,

3. Abatement. [1872; 1880 ch 11 § 1.] *Cal Jur 3d Nuisances § 37, Statutes § 3; Cal Jur 3d (Rev) Criminal Law §§ 1696, 2727; Witkin Summary (8th ed) p 5324.*

§ 3492. [Remedy regulated, how.] The remedy by indictment or information is regulated by the Penal Code. [1872; 1880 ch 11 § 2.] *Cal Jur 3d (Rev) Criminal Law § 1693.*

§ 3493. Remedies for public nuisance. A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise. [1872.] *Cal Jur 3d Nuisances § 26.*

§ 3494. Action. A public nuisance may be abated by any public body or officer authorized thereto by law. [1872.] *Cal Jur 3d Nuisances § 37.*

§ 3495. How abated. Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury. [1872.] *Cal Jur 3d Nuisances § 37; Witkin Summary (8th ed) p 5324.*

§ 3496. [Award of costs and fees to prevailing party] In any of the following described cases, the court may award costs, including the costs of investigation and discovery, and reasonable attorneys' fees, which are not compensated for pursuant to some other provision of law, to the prevailing party:

(a) In any case in which a governmental agency seeks to enjoin the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code.

(b) In any case in which a governmental agency seeks to enjoin the use of a building or place for the purpose of illegal gambling, lewdness, assignation, or prostitution; or any case in which a governmental agency seeks to enjoin acts of illegal gambling, lewdness, assignation, or prostitution in or upon a building or place, as authorized in Article 2 (commencing with Section 11225) of Chapter 3 of Title 1 of Part 4 of the Penal Code.

(c) In any case in which a governmental agency seeks to enjoin the use of a building or place, or seeks to enjoin in or upon any building or place the unlawful sale, manufacture, service, storage, or keeping or giving away of any controlled substance, as authorized in Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code.

(d) In any case in which a governmental agency seeks to enjoin the unlawful sale, service, storage, or keeping or

giving away of alcoholic liquor, as authorized in Article 1 (commencing with Section 11200) of Chapter 3 of Title 1 of Part 4 of the Penal Code. Amended Stats 1987 ch 1076 § 1. *Witkin Procedure (3d) Judgm § 159.*